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No.

In The

Supreme Court of the United States

October Term, 1991

THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY COMPANY,

Petitioner,

vs.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals Of The State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's statement of the case, emphasizes and interjects, for the first time, the argument that the New York Court of Appeals was bound under the United States Constitution (Article 4, Section 1) to give Full Faith and Credit to the Missouri Order liquidating the Transit Casualty ("Transit") and simultaneously cancelling its contracts, including the contract issued to the Respondent (Digirol) in New York State prior to Digirol's fire loss.

Nowhere in Petitioner's Brief on Appeal to the New York Courts, including the Court of Appeals, was the Full Faith and Credit clause of the United States Constitution ever mentioned,

let alone urged by the Receiver of Transit Casualty Company as a basis for sustaining cancellation of Digirol's policy without notice.

Until the "Transit" Receiver moved, subsequent to the decision and Order of the New York State Court of Appeals, for rehearing and reargument or in the alternative to amend that Court's Remittitur, the Ancillary Receiver's present reference to Full Faith and Credit was almost hidden from view in its appellate brief. The Ancillary Receiver failed to highlight such a reference either as an issue in the case or as a point heading.

Basically the Ancillary Receiver argued before the New York State Courts that the process of liquidating insurance companies, who fell into financial trouble, had to be swift in order to protect the company's assets for the benefit of then existing creditors; and that this overriding concern for those creditors justified cancellation of fire policies without notice to policy holders.

Additionally the Petitioner's statement of the case is incorrect to the extent it states that the Respondent Digirol, in making his claim for compensation for his loss under the New York State Property/Casualty Insurance Security Fund, relied exclusively on constitutional due process protection for his contractual property right to notice of cancellation. Although this argument was strenuously urged, Digirol cited precedent without constitutional underpinnings as well as the then recently decided New York State Court of Appeals case of *Mtr. of Consolidated Mut. Ins. Co.*, 77 NY2d 144, to the effect that a contractual right to health care benefits which mature and become vested at time of employee's retirement cannot be terminated by the judicial liquidation of the corporate employer. In *Mtr. of Consolidated Mut. Ins. Co., supra*, the New York State Court of Appeals decided the issue without reference to constitutional due process protection.

SUMMARY OF THE ARGUMENT

Petitioner contends that the Full Faith and Credit clause of the United States Constitution (Article IV, Section 1) required the Courts of New York State, where the insurance contract was issued, to respect the Missouri Judicial Order liquidating the Transit Casualty Company which it contends provided for cancellation of insurance contracts without notice to policy holders.

The Petitioner further contends that it was not guilty of failing to raise this argument in a timely fashion before the New York State Court of Appeals because Petitioner assumed that if the issue was decided against it, on due process grounds, then its present argument for Full Faith and Credit would have been of no avail.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AS AN OBSTACLE PREVENTING THE NEW YORK STATE COURT OF APPEALS FROM DECIDING THAT NOTICE WAS REQUIRED TO EFFECTIVELY CANCEL RESPONDENT'S POLICY WITH THE TRANSIT CASUALTY COMPANY.

Petitioner's excuse for failing to urge the constitutional mandate of the Full Faith and Credit clause is unjustified. The Petitioner contends, in failing to do so, that the Court of Appeals' reliance on New York contract and statutory principles as the basis for the Court's decision was a complete surprise and unexpected in view of Digirol's emphasis on federal procedural due process principles requiring notice to policy holders as a precondition to effective policy cancellation. In other words, the Ancillary Receiver argues that New York precedent provided for can-

cellation of an insurance policy without notice upon the filing of a judicial order liquidating the insurance company, and such precedent could only have been overruled by a finding that the policy holder was entitled to the procedural due process requirement of notice. In the latter event, the Ancillary Receiver contends that the argument for Constitutional Full Faith and Credit would not have been appropriate in the face of a due process violation.

In so arguing the Respondent Digirol contends that there was no clear precedent in New York State governing the issue of notice in spite of those cases cited by the "Transit" Receiver (*Mtr. of Empire State Surety Co.*, 214 NY 553, 108 NE 825 and *People v Commercial Alliance Life Ins. Co.*, 154 NY 95, 30 NE 114) for the proposition that insurance obligations were terminated upon filing the liquidation order or such other time as determined by the Court issuing the order. As the New York State Court of Appeals points out in its majority decision, there were a number of obligations of the insurance company that continue into the future following the date of policy cancellation. Petitioner's appendix 5a. Respondent further contends that the issue of notice was far from settled in New York State. There was no New York case like the Missouri case of *Carr v. Union Mutual Fire Ins. Co.*, 28 Mo. App. 215 (1887) ostensibly holding that notice of cancellation was not required to effectively cancel a fire insurance policy. The Receiver was unjustified in treating the issue as settled law to the extent of treating the application of Full Faith and Credit so cavalierly in its Briefs in support of its argument before the New York Courts. Based upon New York State precedent there is ample reason to believe that the New York State Court of Appeals could eschew Digirol's constitutional argument and decide the case in favor of him based upon New York State common law principles alone.

It is unfair for the Petitioner at this late date to urge that the New York State Court of Appeals violated the Constitutional requirement of Full Faith and Credit in holding contrary to the 100 year old Missouri judicial precedent of *Carr v. Union Mut. Fire Ins. Co., supra*. The New York State Court of Appeals never mentioned Full Faith and Credit in its decision and was justified in this regard. The Receiver's tacit or hint of reliance on the Full Faith and Credit clause by the Received failed to give the New York State Court of Appeals the notice that is necessary to raise the issue before that Court.

Raising the issue now significantly adds a totally new dimension to the arguments addressed before the New York State Court of Appeals and therefore the Full Faith and Credit argument should now be rejected.

II. THE JUDGMENT OF A SISTER STATE SHOULD NOT BE GIVEN FULL FAITH AND CREDIT IF THE EFFECT WOULD BE TO DEPRIVE A PERSON OF HIS RIGHTS WITHOUT DUE PROCESS OF LAW.

Where a judicial order or judgment has been secured without jurisdiction over the persons whose rights are about to be affected, there is no constitutional requirement for Full Faith and Credit. *Old Wayne Mutual Life Association of Indianapolis, Indiana v McDonough*, 204 US 8 (1907)

Although the New York Court of Appeals did not decide the issue, it is clear from the record in this case that the Respondent Digirol was denied due process of law before the New York State Court of Appeals intervened to correct the manifest injustice that occurred when the Missouri Order liquidating the Transit Casu-

alty Company purported to take away his property right to notice cancelling his fire policy. *cf. Brock v Roadway Express, Inc.*, 481 US 252 (1987)

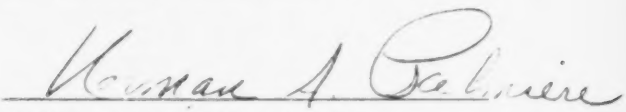
III. THERE IS NO MANIFEST NECESSITY FOR THE UNITED STATES SUPREME COURT TO TAKE JURISDICTION IN THIS CASE.

The unique facts of this case are such that it is unlikely that this type of conflict will ever reoccur. The failure of the Respondent Digirol to receive cancellation notice was a most unusual event and will unlikely reoccur in the future. As the Petition points out, the "Transit" Receiver did attempt to notify Digirol but mistakenly sent the notification to the wrong address. It is this unusual circumstance that has now generated the vast amount of legal argument that has previously been made before the Courts of New York State and which the Petitioner now requests to make again before the Supreme Court of the United States. There simply is no valid reason or precedent that requires the Supreme Court to take jurisdiction in a case involving the narrow and unprecedented factual issue involved in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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